HISTORICAL STUDIES IN ENGLISH JURISPRUDENCE.

II.

CRIMES AND THEIR PUNISHMENT.

By Hampton L. Carson, Esq.

Having considered some of the rules of practice relating to criminal trials, and the method of procedure, we now turn to the crimes themselves, in order to form an adequate idea of the nature of the English criminal code. It is shocking to find how severe and indiscriminate was the punishment visited upon all classes of offenders. As we dwell upon some strange provisions, we shall be tempted to doubt that such a system ever could have prevailed among a people who loudly boasted in the ears of Europe that they were governed by laws of benign and gentle sway.

The most comprehensive division of crimes is into felonies and misdemeanors. Felonies embraced all offences that were punished by death by custom, and included all the crimes of highest grade, from treason and murder to robbery and breach of prison. The punishment attached to felonies, where the offender could not claim the benefit of clergy (which was an exemption from temporal punishment on the ground that the offender was in holy orders, of which the test in early days was ability to read), was death by hanging, forfeiture of lands and goods and corruption of blood. The benefit of clergy was not permitted to high treason nor to misdemeanors, and in the former the death punishment was added to by the sentence that the felon should be drawn and quartered. The phrase "felony without benefit of clergy" practically meant a crime punishable by instant death.

Misdemeanors embraced all the lower grades of crime, from assaults and batteries to perjury and libel. The punishment was generally by fine and imprisonment, sometimes by transportation for life or years.

In addition to these there were many offences falling

within one class or the other by special legislative enactment.

The Common Law, or that great body of customs which owed their validity to the antiquity of their observance, and not to any solemn enactment of Parliament, was not a savage or a bloody code, considering its ancient origin and the barbarism of the tribes among whom it prevailed. In Saxon times human life was rarely forfeited, as blood could be atoned for by money, and each man, according to his station, had his price. As time went on, and civilization increased, and wealth and commerce grew, the government or Court party, or whatever party held the reins of power, became more and more cruel. Crimes punishable by death were created by the score, until the catalogue became an appalling one both as to the number and character of the offences. The marvel is that one generation never repealed the laws of their predecessors; and so the mass went rolling on from century to century, augmenting in bulk, black with terror, heartsickening in its atrocities. The bigotry of kings, the avarice of queens, the ambitious plans of the nobles, the fanaticism of the clergy, the selfish pleasures of the rich, the jealousies of landowners, the brutality of sheriffs, the greed of gaolers, and the interests of scheming monopolists, alike demanded victims and cried out for blood. Whether a man purveyed victuals without warrant, or imported "false and evil coin," whether he stole a falcon or concealed a hawk, or exported wools, leather or lead, the laws of EDWARD I, EDWARD III and RICHARD II inflicted upon these offenders the frightful punishment of death. Yet two of these kings were men who, fired by holy zeal, caught up their arms to battle with the Saracen for the sepulchre of Him who taught "peace on earth and good will towards men."

In a statute of HENRY IV we have a singular instance of royal avarice making war upon the ignorance of the alchemists, who vainly pretended to transmute all metals into gold. The law provided that "none from thenceforth shall use to multiply gold or silver, nor use the craft of multiplication, and if any do he shall incur the pain of

felony." It is stranger still to see, at a much later day, the triumph of knowledge over credulity still tainted with cupidity; for when it was found that smelters feared to exercise their art of refining metals, lest they should incur the penalties of HENRY'S law, WILLIAM and MARY repealed the statute with this proviso, "that the gold or silver extracted by the art of smelting should be carried to the Tower of London, for the making of monies, and be not otherwise disposed of."

In the reign of ELIZABETH, if any one forged a deed or will with the intent to defeat the interest of any person in lands, he was to be placed upon the pillory, have both his ears cut off, his nostrils slit and seared with a hot iron, to be imprisoned all his life and forfeit all the profits of his lands. As late as the days of GEORGE II, one Japhet Croke, *alias* Sir Peter Stranger, was convicted of forging a deed, and suffered all the penalties of the Act.

No new felonies were created in the reign of CHARLES I. In reviewing the succeeding reigns we can only select instances here and there to show the spirit and temper of the times. The following are some of the offences which English kings and queens, lords and commons, thought worthy of the death penalty: to maliciously burn stacks of corn or kill cattle in the night; to personate bail; to counterfeit lottery tickets, stamps, exchequer bills or the seal of the Bank of London; to blanch copper and mix it with silver; to assault a privy counsellor in the execution of his office; to steal a pump from any ship; to burn a wood or coppice; to return from transportation; to take a reward for helping to the recovery of stolen goods; to tear, spoil or burn the garments of any one in the street, or to engage in smuggling.

What rich material is here awaiting the historian and the moralist! What livid colors for the brush of some literary Turner!

In 1736, in the reign of GEORGE II, the list had grown longer and blacker. To appear in disguise in any forest, park, road or heath, and wound or kill a red deer; to rob a warren of rabbits; to steal fish out of any river or pond;

to cut down a tree in any avenue or orchard; to set fire to any house or barn—these acts were punished by death. This was the famous Black Act. To send threatening letters, anonymous or signed by fictitious names, demanding money, venison or other valuable thing; to break down turnpike gates or fences; to steal lead or iron; to damage Westminster bridge; to enlist in the service of any foreign prince without His Majesty's leave; to steal sheep or cattle; to hold correspondence with the sons of the Pretender; to steal linen, fustian or cotton goods from bleaching fields; to cut or destroy velvet in the loom, or to destroy any tools used in the weaving of velvet; to counterfeit any stamp used in the duty on hats; to forge any debenture bond relating to the duties of excise upon beer and cider, hides, skins, and the drawbacks on wines, sweets and ale licenses, and to steal from the person to the value of five shillings—all these were punished by the dreadful penalty of death.

Yet this was the England of SHAKESPEARE and PHILIP SIDNEY, of HALE and MILTON, of ADDISON and POPE, of BURKE and WILBERFORCE and HANNAH MORE!

In the year 1810—within the lifetime of many now alive—Lord HOLLAND, in a debate in the House of Lords, declared that no less than three hundred and thirty-four offences, among the variety of actions that men were daily liable to commit, were punishable by death. These laws had been rigidly enforced. The State trials are filled with the despairing shrieks of thousands of legally-butchered men and women. In the time of HENRY VI more persons were executed in England in one year, for highway robbery alone, than the whole number executed in France in seven years. In the reign of HENRY VIII seventy-two thousand thieves were hanged, at the rate of about two thousand a year. In the year 1685—that awful year, which reddens in the sight as that of the Bloody Assizes—the pitiless and ferocious JEFFREYS executed hundreds of men and women against the law and the evidence. Whole counties were covered by the gibbeted remains of human beings, the air was poisoned by the stench of rotting limbs, and belated trav-

ellers, hurrying o'er the heaths, were startled at each lonely crossroad by swaying bodies hung in chains and glistening in the moonlight with ghastly horrors! In 1763 frequent mention is made, in the books, magazines and newspapers, of the bodies of malefactors, conveyed after execution to Black Heath, Finchley and Kennington Commons or Hounslow Heath, for the purpose of being there permanently suspended. "In those days," says a recent writer, "the approach to London on all sides seems to have lain through serried files of gibbets, growing closer and more thronged as the distance from the city diminished, till they and their occupants arranged themselves in rows of ghastly and grinning sentinels along both sides of the principal avenues. And, by way of a high temple of the gallows, in a central point toward which all these ranges might be supposed to converge—like the temple at Luxor amid its avenue of Sphinxes, or rather, like the blood-stained shrine of Mexitli, in the centre of the capital of Montezuma—stood Temple Bar with its range of grinning skulls, beneath which, when the gory heads were first stuck up, Horace Walpole saw the industrious idle of the city lounging with ample store of spy-glasses, through which passengers were allowed to peep at them for the small charge of one-half penny."

In 1785, in the reign of GEORGE III, no less than ninety-seven persons were executed in London for the offence of shop-lifting; and in 1816, at the very time when Sir SAMUEL ROMILLY was pleading for the repeal of this sanguinary law, there was a child in Newgate Prison, not ten years of age, under sentence of death for stealing. The Recorder of London was reported to have said that "it was intended to enforce the law strictly in the future, to interpose some check, if possible, to the increase of youthful depravity."

English conservatism was strongly stubborn, and resisted for years all movements of reform. The scalding tears and flowing blood of thousands of unhappy victims had failed to thaw the frozen heart of justice. We have not the space within the limits of this paper to trace the history of the amelioration of the criminal code. Humanity

triumphed; the self-sacrificing labors of HOWARD, the caustic wit of SYDNEY SMITH, the eloquence of BROUGHAM, the white-souled philanthropy of ROMILLY, acting on the quickened intelligence and sensitive conscience of the nineteenth century, prevailed at last, and this barbarous code, with all its attendant horrors, passed into history, fit only to be compared to that regulation of the Inquisition which denied to suspected heretics the assistance of the law.

We now go back, in point of time, to glance at a few laws that owed their origin to horror of the black arts. To no other source can be attributed the statutes against rogues and vagabonds; for to be found in the company of those calling themselves Egyptians, though nothing more than gypsies, for the space of one month, was visited by death. The language of the statute of 22d Henry VIII, is curious and worthy to be quoted. It reads as follows: "An Act for the avoiding and banishing out of this realm of certain outlandish people, calling themselves Egyptians, using no craft nor feat of merchandise for to live by, but going from place to place in great companies, using great, subtile and crafty means to deceive the King's subjects bearing them in hand, that they, by palmistry, could tell men's and women's fortunes." They are then banished from the realm under pain of death. Superstition and cruelty could scarcely go farther than this.

In the first year of the reign of JAMES I, it was enacted that "if any person shall use, practise or exercise any invocation or conjuration of any evil or wicked spirit; or shall consult, entertain, employ, feed or reward any wicked or evil spirit, to or for any intent or purpose; or take up any dead man, woman or child out of his or their graves or any other place, or the skin, bone or any other part of any dead person, to be employed in any manner of witchcraft, sorcery, charm or enchantment, whereby any person shall be killed, destroyed, wasted or consumed, pained or lamed in his or her body or any part thereof, every such person or persons, their aiders, abettors and counsellors, being thereof convict and attaint, shall suffer death as a felon without clergy." Or if any one should undertake, by witchcraft, to tell where

treasures of gold or silver could be found, or where stolen goods could be recovered, or cast a spell on anyone, or whereby the cattle or goods of a person shall be wasted or destroyed, he shall, upon conviction of a first offence, suffer imprisonment for one year, and once a quarter stand two hours in the pillory; and if convicted of a second offence he shall die a felon's death.

Under this law many trials and executions took place. The great and pure name of Sir MATHEW HALE is stained by his actions upon the trials of the witches at Bury St. Edmund's in 1662. It is not, perhaps, to be wondered at in that dark age that the mind of the judge was unable to cast off the thrall of superstition, because he openly declared that Holy Writ had said "Thou shalt not suffer a witch to live;" but it is strange as well as sad to see how completely nervous dread had paralyzed his powerful mind, for he failed to enforce the rules of evidence, of which he was so great a master, so as to connect the prisoners with the charge. Had he done so, their lives would have been spared. The trials are very interesting, but we can only allude to them in a few words.

The charge was that Amy Dory and Rose Cullender, two wrinkled old women, had bewitched several children. The mother of one child had left her infant for the day with one of the old women, and at night he fell into such strange fits of swooning that the mother was much frightened. She went to a Doctor Jacob, who told her to hang the child's blanket up in the chimney corner all day, and at night, when she put the child into bed, to put it into the blanket, and if anything fell out to throw it into the fire. And when she took the blanket down a great toad fell out, which hopped up and down the hearth, and she cast it into the fire, and after sputtering for awhile, "there was no more seen than if there had been none there," and after the toad was burned the child recovered and was well.

The other children were said to have cast up pins and nails, and to have become speechless whenever Amy Dory touched them. The children had also, at some previous time, declared that the witches had visited them in the

form of a bee and a mouse. At times the children would see things run up and down the house like poultry or mice, "and one of them screeched out like a rat when touched by the tongs." There was no evidence at all to connect the so-called witches with these silly fancies; the evidence rested on the simple hearsay evidence of the declarations of the children, who would not or could not themselves testify in Court, because some of them were too sick to be brought there and the rest were said to be speechless. Then the famous Dr. THOMAS BROWNE, of Norwich, the author of the "Religio Medici," and a man of great knowledge and repute, was put upon the witness-stand. He was clearly of opinion that the children were bewitched, "because in Denmark there had been a great discovery of witches who afflicted people by conveying pins into them, and needles and nails." Then comes an expression of opinion that would shame some of our modern experts: "The devil in such cases did work upon the bodies of men and women upon a natural foundation; that is, he stirred up and excited humors in the body to great excess, whereby he did, in an extraordinary manner, afflict them with distemper, but only heightened by the subtility of the devil, co-operating with the malice of the witches who instigate him to villainy."

This learned nonsense appeared to be sufficient to satisfy the judge, until some ingenious person suggested that the children might be guilty of deceit; and so they were blindfolded and told that the witches were approaching, and then another person touched them, which produced the same effect as the touch of the witch, by throwing them into fits. "This put the Court and all persons into a stand," until it was remarked that possibly the children might be deceived by a suspicion that the witches had touched them, when they did not. This shrewd suggestion removed all doubt, but evidence was still further produced that Rose Cullender must be a witch, because two years since a carter had run his wagon against her house, and she was angry and must have bewitched his cart, because it upset several times during the day, and his horses afterward died.

The judge, instead of telling the jury that there was absolutely no evidence to show that the prisoners were guilty, briefly declared that witchcraft existed, and that he would not repeat the evidence, which he desired them strictly to observe, "for to condemn the innocent and to let the guilty go free were both an abomination to the Lord." In half an hour the jury convicted them, and at the same time the children recovered their speech and health, and slept well that night, "only little Susan Chandler felt a pain like pricking of pins in her stomach." The Court gave judgment that the witches be hanged.

Thus superstition opened wide her main, and fed upon the bodies and the minds of men. We smile at the learned folly of those days; we marvel at the helplessness of so great a judge, and are startled at the ignorance of so distinguished an ornament of learning as Sir THOMAS BROWNE, when we remember that this was the age of MILTON, LOCKE, and WILLIAM PENN; but as late as 1711 we find Mr. ADDISON, in the *Spectator*, avowing his belief that there is such a thing as witchcraft, and many years after the Statute of 9th George II had forbidden prosecutions for witchcraft, Sir WILLIAM BLACKSTONE boldly declared his belief that Mr. ADDISON was right.

Let us now look at a few examples of fanaticism. There was an ancient writ, known to the Common Law, by which heretics were burned—the De Hæretico Cimbarendo. It was not very well determined who had the authority to convict of this offence, nor did the laws declare very specifically what constituted the offence. In the reign of HENRY IV the seeds of the Reformation had begun to spread under the name of Lollardy, and the clergy sharpened to its keenest edge the axe of persecution. Statutes were passed and repealed and re-enacted as Protestants and Catholics in turn ascended the throne. The Six Bloody Articles were established. The opposers of transubstantiation were sentenced to be burnt by fire; and those denying communion in one kind, celibacy of the clergy, monastic vows, the sacrifice of the Mass and auricular confession, were to suffer death as felons. In the reign of PHILIP and

MARY, Cardinal POLE was sent from Rome to call the realm back into the right way, from which it had strayed. Statutes were passed for the repressing of heresies and the enormities of Lollardy, while all statutes against the See of Rome were repealed. The first act of ELIZABETH was to restore all ancient jurisdictions to the crown, to repeal all former statutes and abolish all foreign power. Jesuits and priests were ordered to depart, and forbidden to return to the realm. The penalty for receiving them was felony without clergy. Persons were punished for obstinately refusing to come to church, or for persuading others to impugn the Queen's ecclesiastical authority. Popish recusants were subjected to penalties for removing to a greater distance than five miles from the places of their abode. The laws of ELIZABETH were less severe than those of her predecessors, but the writ for burning heretics remained in force, and the most recent instances of its being put in execution were upon two Anabaptists in the seventeenth year of her reign, and upon two Arians in the ninth year of JAMES I.

Ignorance, superstition, intolerance and bigotry led monarchs to believe that they alone held the lamp of truth, while all others wandered in utter darkness; and so they gravely set themselves the task of solving the problem, as stated by BECCARIA, that, given the force of the muscles and the sensibility of the nerves of a conscientious man or woman, it is required to find the exact degree of pain necessary to extort a confession of heresy, or to work a change of religious convictions. Strange that it should have cost the world centuries of woe before men could learn that fire can never burn the conscience into ashes, that persecution can never rack the bones of truth, and that bigotry can never seal the prison doors of liberty! It is also strange that the most fiendish passions of the heart have been those kindled in the name of religion.

The old Saxon idea, embodied in the ordeal, of appealing to Heaven for a decision upon earthly questions, took shape in the Norman trial by battle, which was the recognized method of determining the ownership of land. The

champions of the parties to the suit contended with each other in lists, enclosed like those of chivalry, from sunrise until the stars appeared in the evening, with staves an ell long, and a leathern target, in the hope that victory would be awarded unto him to whom the right belonged. A celebrated case of this kind occurred in the reign of ELIZABETH None else was known until 1818, when in the case of Ashford *v.* Thornton, where the defendant insisted upon his right to wage battle under the law, Lord Chief Justice CAMPBELL decided "that the law of the land was in favor of the trial by battle, and it is our duty to pronounce the law as it is, and not as we may wish it to be." The public horror and disgust, which led to the passage of an Act of Parliament changing the law, are well described in HENRY CRABBE ROBINSON'S Diary.

Two curious enactments of PHILIP and MARY challenge attention. One provided that whoever wore silk on his hat, girdle, scabbard, hose, shoes, or spur leather, should be imprisoned for three months and forfeit ten pounds. The other furnished a convenient means of replenishing an exhausted exchequer by compelling persons convicted of speaking false and malicious scandal of the king or queen, to stand in the pillory and lose their ears, or else pay one hundred pounds to the queen.

Several centuries later, laws were passed against buying up provisions in a market for the purpose of selling them again, which constituted the offences of forestalling and regrating, and were forbidden because the price of food might be increased.

In the long list of offences thus hastily reviewed, stretching from the time of EDWARD I to WILLIAM IV, a period of more than five hundred years, we have seen reflected as in a mirror some of the features of the English people: their brutality, their avarice, their superstition, their fanaticism, their hatred, their fears, their pleasures, their tyrannies, their ignorance of human nature, of political economy, and of the laws of trade. It is not an agreeable picture, we confess, but it is none the less true, and will only add to our appreciation of the many noble and heroic traits which exist in English character.

"The laws," says the celebrated BECCARIA, "are always several ages behind the actual improvement of the nation which they govern." This observation, while true of law in general, is particularly true of the criminal law.

SUPREME COURT OF TENNESSEE.

NASHVILLE TRUST CO. *v.* FOURTH NATIONAL BANK.

SYLLABUS.

Assignment for Benefit of Creditors—Set-off in Insolvency.—A bank held the notes of a depositor who became insolvent and made an assignment for the benefit of creditors. *Held*, that the bank had a right to set off the notes against the deposit, although the assignment occurred before their maturity.

The facts are sufficiently stated in the opinion of the Court.

E. H. EAST, ESQ., and J. C. MCREYNOLDS, ESQ., for appellants.

Messrs. DICKENSON and FRAZER for appellee.

OPINION OF THE COURT.

PITTS, Special Judge.—The Connell-Hall-McLester Company, a Tennessee mercantile corporation located at Nashville, executed a general assignment to the Nashville Trust Company, for the benefit of creditors, on the 4th day of June, 1891. The deed of assignment conveyed to the assignee all the property and assets belonging to the assignor company, schedules being annexed under oath, specifying, among other things, all moneys on deposit in the Fourth National Bank of Nashville. At the date of the assignment the assignor company had on deposit, subject to its check, in said bank, $5,222.66, and the bank held its four notes for borrowed money, due as follows:

One due July 3, 1891, for	$10,000 00
One due July 17, 1891, for	4,500 00
One due July 19, 1891, for	9,000 00
One due August 22, 1891, for	4,500 00
Making total of	$28,000 00